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No. A-876

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Did the court below err in holding that the plaintiff in an action under 42 U.S.C. § 1982 must prove that he or she is a member of a "non-white race," with the result that Jews can never state a claim under 42 U.S.C. § 1982 even where, as here, they are the victims of conduct motivated by a Ku Klux Klan and Nazi-inspired racial animus against Jews?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were appellants (now petitioners) Shaare Tefila Congregation, Rabbi Martin S. Halpern, Shirley Altman, William Harkaway, Marshall S. Levin, Maurice Potosky and Dr. Jacob Teller. Petitioners will be referred to collectively herein as "the Congregation." Appellees below (now respondents) were John William Cobb, William Randall Harris, Thomas Lloyd Heine, William Hess, Thomas Joseph Hunt, Jr., Raymond Lee Jordan, Dominic Queen and Michael David Remer. The Rule 28.1 statement regarding Shaare Tefila Congregation was made in its Application for Extension of Time to File Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit, filed May 14, 1986, at note 1.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Shaare Tefila Congregation* v. *Cobb*, 785 F.2d 523 (4th Cir. 1986) and is printed as Appendix A (App. 1a *et seq.*) hereto.[1] The opinion of the United States District Court for Maryland is reported as *Shaare Tefila Congregation* v. *Cobb*, 606 F. Supp. 1504 (D. Md. 1985) and is printed as Appendix B (App. 24a *et seq.*) hereto.

JURISDICTION

The Fourth Circuit's judgment was rendered and entered on March 7, 1986 (App. 36a). By order of Chief

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[1] "App." refers to the Appendix to this petition, filed separately herewith.

Justice Warren E. Burger, as Circuit Justice for the Fourth Circuit, petitioners were granted an extension of time to file this petition to and including July 5, 1986. The jurisdiciton of this Court is invoked under 28 U.S.C. § 1254(a).

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 1982 (1982)

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Civil Rights Act of 1866
Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

STATEMENT OF THE CASE

On November 1, 1982, respondents desecrated the synagogue of Shaare Tefila Congregation with spray-painted anti-Semitic slogans and symbols, including swastikas, a

burning cross, the words "DEAD JEW," "DEATH TO THE JUDE," and "IN, TAKE A SHOWER JEW" (App. 43a, 49a-56a).[2] Respondents had gathered that evening behind a Drug Fair, which is just a short walk across a parking lot from the synagogue. While respondents drank alcohol and talked, they spray-painted the outside walls of the Drug Fair with a burning cross, the slogans "White Power" and "Arian [*sic*] Brotherhood," the initials KKK, an eagle with a swastika, a Star of David with an arrow through it, and their initials. It was at the Drug Fair that one of the respondents suggested: "Somebody should do that on a synagogue." Respondents then walked through the parking lot and defaced the outside walls of Shaare Tefila (App. 43a).

The tragic legacy of Nazi Germany and the systematic killing of over six million Jews were evoked by the paintings of swastikas, an eagle over a swastika, and the words "DEATH TO THE JUDE," "IN, TAKE A SHOWER JEW," "TOTEN KAMF RABAND," and "DEAD JEW" on the synagogue walls. The swastika was the symbol of the Nazi Party from its inception, and the phrases "DEAD JEW," "DEATH TO THE JUDE" (Jude is German for Jew), and "IN, TAKE A SHOWER JEW" refer to the Third Reich's "final solution to the Jewish problem"—the Holocaust (App. 61a-63a). The phrase "TOTEN KAMF RABAND" next to the skull and crossbones painted on the synagogue is a garbled reference to the Totenkőpfverbande, which were the "death head units" of Nazi concentration camp guards from 1936 through World War II (App. 63a). The skull and crossbones was the insignia of the Totenkőpfverbande (App. 63a).

Because respondents' acts were based on misguided ideologies that hold as a central tenet that Jews are a separate and inferior race, the Congregation filed a civil rights action in the United States District Court for

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[2] Photographs showing the defacement of the synagogue walls are at App. 51a-56a.

Maryland, seeking redress under 42 U.S.C. §§ 1981, 1982, and 1985(3) (App. 39a-48a).[3] The complaint specifically alleged that respondents' conduct "was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews," in violation of 42 U.S.C. § 1982 (App. 45a). Although discovery has not been completed,[4] the record below confirms the allegations. It is clear that respondents chose the words and symbols they painted on the synagogue because of their association with Nazi and KKK ideology. Respondents have identified the swastika as a Nazi symbol and all four respondents who have been deposed have identified the eagle painted on the Drug Fair as a Nazi eagle. Various respondents also conceded their understanding that the slogans "DEAD JEW" and "IN, TAKE A SHOWER JEW" referred to the Nazi extermination of Jews during World War II. For example, respondent Cobb connected the slogans painted on the synagogue with Nazi activity during World War II:

> Q. The last exhibit, Exhibit J, has a picture. Can you tell me what that picture says?
>
> A. It says, "In" and "Take a shower Jew."
>
> Q. Do you know what the historical significance of take a shower Jew is?
>
> A. I guess that's how they executed some of the Jews in World War II.
>
> Q. How?
>
> A. I guess they made them take a shower and poisoned them or something, gassed them.

Deposition of John W. Cobb (Sept. 6, 1984) at 58-59.

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[3] The Congregation also brought pendent state claims for trespass, nuisance, and intentional infliction of emotional distress (App. 46a). Jurisdiction in the district court was alleged under 28 U.S.C. §§ 1331, 1343(a)(1) and (4), 2201, 2202, and principles of pendent jurisdiction (App. 41a).

[4] The Congregation has taken the deposition testimony of respondents Hunt, Heine, Queen, and Cobb. While the motion to dismiss was pending, the Congregation sought leave to depose respondent Remer in prison pursuant to Fed. R. Civ. P. 30(a). That motion was pending when the district court dismissed the complaint.

Respondent Heine testified similarly:

> Q. What do you think about when you see the phrase, "Dead Jew?"
>
> A. About the Holocaust.

Deposition of Thomas Lloyd Heine (Oct. 19, 1984) at 76.

Various respondents also have testified that there was discussion among the defendants about the Nazis during the defacement of the Drug Fair and the synagogue. For example, respondent Heine testified that respondent Remer talked about the Nazis during the course of the desecration on November 1:

> I don't know exactly what Michael Remer said, but he was saying something about some things that he was doing. But it had to do with Nazis and stuff. He was talking about like where it took place in the Holocaust or something. . . .

Deposition of Thomas Lloyd Heine (Oct. 19, 1984) at 40. *See also id.* at 78.

The slogans and symbols painted by respondents bespeak respondents' adoption of the false and abhorrent doctrine of Nazis and the Ku Klux Klan that Jews are a distinct and inferior race. The undisputed affidavits of Robert Wolfe and David M. Chalmers, which the Congregation submitted in opposition to the motion to dismiss (App. 57a-75a), show that the Nazi and KKK bias against Jews is based on racial prejudice. Mr. Wolfe, the Chief of the Modern Military Headquarters Branch of the National Archives, is the custodian of captured documents of the Third Reich (App. 61a). Mr. Wolfe attested that "[i]t was one of the central tenets of Nazi ideology that Jews were defined as racially distinct from Aryan, or white, German citizens" (App. 63a).[5] The Nuremberg

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[5] The basis for Hitler's virulent anti-Semitism and program to exterminate the Jews was the misconceived belief that Jews are racially distinct:

Laws of September 15, 1935 and November 14, 1935 raised this notion to a legal command: Jews were declared a separate race and denied the rights of German citizens (App. 63a, 66a-75a).[6] Dr. Chalmers, one of the foremost authorities on the Ku Klux Klan and author of *Hooded Americanism: The History of the Ku Klux Klan* (2d ed. 1981), attested that "a prevalent belief among the various Ku Klux Klan groups is that Jewish people are racially distinct from whites" (App. 58a).[7]

> The Jew has always been a people with definite racial characteristics and never a religion . . . .
>
> * * *
>
> The Jewish state was never spatially limited in itself, but universally unlimited as to space, though restricted in the sense of embracing but one race . . . . It is one of the most ingenious tricks that was ever devised, to make this state sail under the flag of "religion," thus assuring it of the tolerance which the Aryan is always ready to accord a religious creed. For actually the Mosaic religion is nothing other than a doctrine for the preservation of the Jewish race.

A. Hitler, *Mein Kampf* 306, 150 (R. Manheim trans. 1943).

[6] That Nazism and other forms of anti-Semitism are motivated by racial prejudice has been judicially recognized. *See Banker* v. *Time Chemical, Inc.*, 579 F. Supp. 1183, 1186 (N.D. Ill. 1983) ("[t]he vicious anti-Semitism directed against the Jews of Nazi Germany, for example, was racially motivated . . ."); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 567 (E.D. Cal. 1982) ("[t]he history of 'racial prejudice' against Jews throughout Europe and in this country appears to be so well known as almost not to require documentation").

[7] This conclusion is supported by other studies:

> The fundamental theme of Klan ideology is the racist doctrine of "white supremacy," a concept that has motivated the hooded orders since their inception. It serves as justification for bigotry and violence against blacks, Jews, Hispanics, Orientals and other minorities.

Anti-Defamation League of B'nai B'rith, *Hate Groups in America: A Record of Bigotry and Violence* 17 (1982).

In The Thunderbolt, the official publication of the National States Rights Party, which is ideologically linked to the Klan, J.B. Stoner, the party's national chairman, distinguished Jews from whites:

Several respondents conceded on deposition to an understanding that the slogans and symbols they painted invoke an ideology which extols a superior race, a white race that excludes Jews. For example, respondent Heine offered the following explanation of Nazi racist ideology:

> Q. Are you at all familiar with the rise of the Nazi Party in Germany in the 1930's?
>
> A. Mm hm.
>
> Q. Can you tell us what you know?
>
> A. Not too well in depth, but from what I know from books, they wanted to develop a superior race. And that's all I know.
>
> Q. Do you know what race that would be?
>
> A. Well, they described it as being tall, white hair, and real muscular, I guess. That's basically what I hear.
>
> Q. Do you know if that would include blacks?
>
> A. I don't think it would. They wanted a specific race. They wanted a specific look for the race.
>
> Q. Do you know if that would include Jews?
>
> A. No, they were against Jews. That's what they didn't want, I guess.
>
> Q. So you would say that the Nazi race is a different race from the Jewish race?
>
> A. Yeah. Yes, I would.

Deposition of Thomas Lloyd Heine (Oct. 19, 1984) at 52-53.

> The negro [*sic*] is a violent enemy and he is a biological enemy because nego [*sic*] blood destroys White blood when the two are mixed together. However, the negro [*sic*] is not the enemy. The Jew is THE enemy of our White Race and the Jew is using the negro [*sic*] in an effort to destroy the White Race that he so passionately hates.

J. Stoner, *The Philosophy of White Racism*, The Thunderbolt (Oct. 1973).

Respondent Queen also understood that the slogan "Aryan Brotherhood" (painted by respondents on the Drug Fair as "Arian [*sic*] Brotherhood") reflected a Nazi racist ideology that excluded Jews from the "white race":

> Q. Do you understand what that ["Aryan Brotherhood"] means?
>
> A. Yes.
>
> Q. What does that mean to you?
>
> A. I guess the brotherhood of blond hair, blue-eyed people, I guess.
>
> Q. So, in other words, it would be the brotherhood of people, whites who are other than Jews?
>
> A. Yes.

Deposition of Dominic Queen (Apr. 18, 1984) at 21-22.

Respondent Cobb testified that Remer spoke about the white race while he was defacing the Drug Fair:

> Q. To the right of that eagle is the term "Aryan brotherhood."
>
> A. That's what he [Remer] was talking about. I didn't know what it meant but that's what he was talking about, the white race or something like that.

Deposition of John W. Cobb (Sept. 6, 1984) at 29.

When asked why he thought a Jew seeing the phrase "Dead Jew" painted on a synagogue would feel uncomfortable, respondent Hunt replied: "It's an insult to your race." Deposition of Thomas Joseph Hunt, Jr. (Nov. 1, 1984) at 94.

Before discovery was completed, respondent Remer, through court-appointed counsel, filed a motion based on Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint in its entirety. Without hearing oral argument or considering the extensive deposition testimony, affidavits, or other material

which the Congregation submitted with its opposition to the motion, the district court granted Remer's motion to dismiss all counts of the complaint.[8] Apparently believing that whether the defendant acted out of racial prejudice turns on whether the plaintiff is a member of a "non-white" race, the district court concluded that Jews could never state a claim under sections 1981 and 1982 because permitting such a claim would allow the coverage of those sections to turn "entirely on the idiosyncrasies of individual defendants" (App. 30a).

A panel of the United States Court of Appeals for the Fourth Circuit affirmed, but filed three separate opinions. (App. 1a-23a). Judge Hall, writing for the court, concluded that he did not "find the position of Jews in this society to be analogous to that of Mexican-Americans or others commonly considered to be non-whites," and so to allow the Congregation to state a claim under section 1982 "would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants. Such perceptions are not what section 1982 was intended to protect against" (App. 7a). Judge Murnaghan, who concurred with Judge Hall, agreed that respondents' "misperceptions of fact" should not confer federal jurisdiction, and concluded that "such

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[8] The deposition excerpts and affidavits cited herein were among the materials submitted by the Congregation with its opposition to respondents' motion to dismiss in the district court. The district court explained that it would not consider the extra-pleading materials because they "are inappropriate in a motion based, as this one is in part, on Rule 12(b)(1). . . ." This is a highly questionable conclusion. *See Saval* v. *BL Ltd.*, 710 F.2d 1027, 1029 n.2 (4th Cir. 1983) ("As to motions to dismiss under Rule 12(b)(1), courts may consider affidavits and other extrinsic information to determine whether subject matter jurisdiction exists."). In any event, when the district court chose to exclude the material outside the pleadings, it was bound to deny the motion unless it appeared beyond doubt that the Congregation could prove no set of facts which would entitle its members to relief. *See Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

ill mannered and unreasoned fracases" belong in state courts (App. 10a).

Judge Wilkinson dissented. He reasoned that respondents' conduct here was no more mistaken than any other act of racism, because all such acts are at some fundamental level wrongheaded and in error:

> All racial prejudice is the result of subjective, irrational perceptions, which drain individuals of their dignity because of their perceived equivalence as members of a racial group. The Civil Rights Acts of 1866 and 1871 were enacted precisely to halt the spread of violence and hatred by those motivated by such perceptions, and plaintiffs in this case, no less than those in the usual racial discrimination case, have suffered the consequences of abhorrent notions concerning racial identity and its relevance. Rather than allowing ignorance and misperception to provide their own defense, I would find the erroneous but all too sincere view of defendants that Jews constitute a separate race worthy of humiliation and degradation sufficient to bring the claim within 42 U.S.C. §§ 1982 and 1985(3).

(App. 11a (footnote omitted)).[9]

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[9] Judge Wilkinson concluded that the Congregation's claim under section 1985(3), the civil rights conspiracy statute that originated in the Ku Klux Klan Act, should be reinstated to the extent it alleges a violation of section 1982 (App. 11a). This is true because federal statutory violations constitute deprivation of "equal protection of the laws or equal privileges and immunities under the laws" which give rise to liability under section 1985(3). *See Great Am. Fed. Sav. & Loan Assoc.* v. *Novotny*, 442 U.S. 366, 376 (1979). *Accord, e.g., McNutt* v. *Duke Precision Dental & Orthodontic Laboratories, Inc.*, 698 F.2d 676, 679-80 (4th Cir. 1983) ("Section 1985(3) merely provides a remedy for the violation of rights guaranteed by federal law or the Constitution"); *Holmes* v. *Finney*, 631 F.2d 150, 154 (10th Cir. 1980) ("[I]nfringement of some federally protected right independent of § 1985(3) is required for a violation of the conspiracy statute to be demonstrated"); *Cohen* v. *Illinois Inst. of Technology*, 524 F.2d 818, 828 (7th Cir. 1975),

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Determination that Jews Can Never State a Claim of Racial Discrimination Under Section 1982 Should Be Reviewed and Reversed Because It Is Contrary to Controlling Decisions of This Court on a Matter of Fundamental Importance.

The Court of Appeals in this case required as an essential element of a section 1982 claim that plaintiffs must show that they are members of a "racially distinct group" that is "commonly considered to be non-white[]" (App. 7a). This Court has never required plaintiffs seeking redress under the federal Civil Rights Acts to demonstrate that they actually are racially distinct from whites. To the contrary, in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), this Court held that 42 U.S.C. § 1981 prohibits discrimination against whites as well as nonwhites.[10] The Court drew its conclusion from the language of the statute which "explicitly applies to '*all* persons' (emphasis added), including white persons." 427 U.S. at 287. Section 1982 as well, by its

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cert. denied, 425 U.S. 943 (1976) ("There is . . . a requirement that the conspiracy deprive the plaintiff of a federally protected right"); *Witten* v. *A.H. Smith & Co.*, 567 F. Supp. 1063, 1071-72 (D. Md. 1983) (federal statutory rights, specifically including rights under section 1981, may serve as a substantive basis for redress under section 1985(3)).

The Congregation does not seek certiorari to review the court's conclusions that claims arising under the "full and equal benefit" clause of 42 U.S.C. § 1981 require state action and that section 1985(3) does not protect against violations of state law or, on the facts presented, the right to engage in interstate travel.

[10] Section 1981 and section 1982 both originated in section 1 of the Civil Rights Act of 1866. Thus, "[i]n light of the historical interrelationship between § 1981 and § 1982 [there is] no reason to construe these sections differently . . . ." *Runyon* v. *McCrary*, 427 U.S. 160, 171 (1976), *quoting Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973).

terms, protects "[a]ll citizens of the United States," not just non-whites.[11]

This Court has declared that "history leaves no doubt that, if we are to give [section 1982] the scope that its origins dictate, we must accord it a sweep as broad as its language." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968), *quoting United States* v. *Price*, 383 U.S. 787, 801 (1966). *Accord, City of Memphis* v. *Greene*, 451 U.S. 100, 120 (1981); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). *McDonald* concluded that the remedial purpose of Congress can only be effectuated if the federal Civil Rights Acts protect everyone, of whatever race, who is a victim of racial discrimination. Plaintiffs must show discrimination that is racial in character

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[11] In *McDonald*, this Court rejected the argument that the statutory language affording to all persons the same right to make and enforce contracts "as is enjoyed by white citizens" limited the scope of its coverage to nonwhites. The Court explained that it had "previously described this phrase [which is found in both sections 1981 and 1982] simply as emphasizing 'the racial character of the rights being protected,' *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966)." 427 U.S. at 287. The Court further concluded that any ambiguity in the statutory language was resolved by an examination of the legislative history of the Civil Rights Act of 1866. The debates revealed that "the bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as nonwhites." 427 U.S. at 289 (footnote omitted). Senator Trumbull, who introduced the bill ultimately enacted as the Civil Rights Act of 1866, described it as a " 'bill . . . to protect *all* persons in the United States in their civil rights . . .' (emphasis added), and was initially described by him as applying to 'every race and color.' " 427 U.S. at 287, *quoting* Cong. Globe, 39th Cong., 1st Sess., 211 (1866) (hereafter "Cong. Globe"). In the closing debate in the Senate, Senator Trumbull responded to opponents by saying "this bill applies to white men as well as black men." Cong. Globe at 606-07, *quoted at* 427 U.S. at 290. The Court viewed the House addition of the phrase "as is enjoyed by white citizens" as a "technical amendment without substantive effect." *Id.* at 291.

in order to be protected, but not that they are in fact racially distinct from any other group.[12]

McDonald leaves no room for a Court of Appeals to require that a victim of racial discrimination struggle to bring himself within a particular racial classification in order to show that he is covered by the statutes emanating from the Civil Rights Act of 1866. As Judge Wilkinson stated in dissent:

> Without so much as a hint as to the affirmative reach of § 1982, the majority asserts *ipse dixit* that defendants' actions 'are not what section 1982 was intended to protect against.' [App. 7a] This conclusion cannot withstand analysis. Federal civil rights laws protect citizens from acts of discriminatory intent. The discrimination found here is no different in character or consequence from that found in every racial discrimination case. Misperception lies at the heart of prejudice, and the animus formed of such ignorance sows malice and hatred wherever it operates without restriction. By removing the restriction of federal laws, the majority allows racial motivations greater latitude to effect their intolerable aims. There is simply no good reason why we should interpret this statute to protect against some forms of racial animus but not others.

(App. 13a).

Moreover, the Fourth Circuit's analysis attempts to inject into litigation under the Civil Rights Acts some objective and technical, but undefined, notion of "race," and then requires the plaintiff to show that he or she is, in fact, non-white or "racially distinct." The day should be

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[12] *Accord, Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) ("§ 1 [of the 1866 Act] was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute"); *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966) ("[t]he legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality").

long past when any court involves itself in the task of defining what ancestry or percent of "blood" descent qualifies any of us for membership in a given race.[13] Setting federal courts to this task is inappropriate and unnecessary because it involves " 'precisely the kind of stereotyping which the civil rights statutes were designed to prevent.' " Wilkinson, J. (App. 21a), quoting *Khawaja* v. *Wyatt*, 494 F. Supp. 302, 305 n.1 (W.D.N.Y. 1980). Moreover, a requirement of proving racial membership is a meaningless test because there exists no straightforward, objective definition of "race" to which anthropologists or sociologists universally subscribe.[14]

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[13] *See Perez* v. *Lippold*, 32 Cal. 2d 711, 198 P.2d 17 (1948) (Traynor, J.) (miscegenation law unconstitutionally vague because court is unable to determine "race" of individuals to which statute applies); *Messina* v. *Ciaccio*, 290 So. 2d 339, 341-42 (La. App. 1974) (ruling that statute, later repealed, can virtually never prohibit designation of individual as Caucasian, because such a prohibition would require "a genealogical charter on each person in a questioned person's ascending line to determine with the exactness required by the statute the percentage of Negro blood ascribed to each ancestor").

[14] *See, e.g., United States* v. *Bhagat Singh Thind*, 261 U.S. 204, 212 (1923) ("The various authorities are in irreconcileable disagreement as to what constitutes a proper racial division. . . . [T]o arrange [the varieties of mankind] in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.") *Accord*, A. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 23 (5th rev. ed. 1974); A. Montagu, *The Concept of Race*, in *The Concept of Race* 16-17 (A. Montagu ed. 1964); J. Hiernaux, *Problems of Race Definition*, 17 Int'l Soc. Sci. J. 115 (1965) ("Race is not a fact; it is a concept, and one which by no means has the same meaning for every biologist today."); Littlefield, Lieberman, & Reynolds, *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 Current Anthropology 641, 646 (1982) ("Although the [view that race has no objective meaning] was rarely expressed in physical anthropology texts before 1970, it had become the most frequent view by 1975-79, with only one-quarter of the textbooks continuing to argue for the validity of the race concept."); S. Washburn, *The Study of Race*, in *The Concept of Race* 251 (A. Montagu ed. 1964); S. Molnar, *Human Variations: Races, Types, and Ethnic Groups* 22 (1983).

The Fourth Circuit also raises the spectre that a plaintiff must be "commonly considered" to be non-white as a prerequisite for the protection of section 1982. Even if this were an appropriate criterion, the plaintiffs here were never given an opportunity to show the prevalence of the view that they are racially distinct.[15] As Judge Wilkinson pointed out in dissent:

> [T]he majority's assertion of the common perception of Jews is totally unsupported. The level and persistence of racial violence against Jews . . . certainly suggests that the misperceptions here are shared by too sizeable a number of individuals. One anthropologist has observed that "Jews are nearly always referred to in popular parlance as a 'race.' This is done not only by the so-called 'man in the street' but also by many scientists, medical men, philosophers, politicians, historians, and the members of many other professions." A. Montagu, *Man's Most Dangerous Myth*, at 353 (footnote omitted). Thus, there exists a real question about the breadth of the views at work in this case. If the majority insists that misperceptions be broad based for § 1982 to apply, plaintiffs should at least be given the opportunity to show the scope of the belief that they are members of a distinct race.

(App. 20a).

The Congregation fervently wishes that the respondents' racial perceptions of Jews were not shared by others, but the historical and contemporary record demonstrates that they are not alone. Neo-Nazi and Klan

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[15] In attempting to distinguish *Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979), in which the court held that a Mexican-American could state a section 1981 claim, the Fourth Circuit observed that "we do not *find* the position of Jews in this society to be analogous to that of Mexican-Americans or others commonly considered to be non-whites" (App. 7a (emphasis added)). The court cited no evidence in support of its "finding" that Jews are not commonly considered to be non-whites.

groups openly embrace an ideology which includes racist bias against Jews; this racist bias, regrettably, is not an anomaly.[16] The respondents here, like the Nazis and Klan

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[16] For example, the National Socialist Party of America views itself as a successor to Hitler's National Socialist movement. The first "fundamental principle" of American National Socialism is "Acceptance of Adolf Hitler." H. Covington, *10 Fundamentals of National Socialism*, The New Order 3 (Mar. 1979). Also among its "fundamental principles" is belief in "The Jew as the Ultimate Enemy." The official party newspaper expresses this principle in the following terms:

> The single serious enemy facing the White man is the Jew. The Jews are not a religion, they are an Asiatic *race*, locked in mortal conflict with Aryan man which has lasted for millennia, and which will continue until one of the two combat peoples is extinct.

H. Covington, *10 Fundamentals of National Socialism*, The New Order 3 (Mar. 1979) (emphasis in original).

In perpetrating hate violence, neo-Nazis have identified Jews as targets because Jews are perceived as non-white. For example:

> [I]n Houston, Texas, in December, 1977, the local unit of the National Socialist White Workers Party, through its recorded telephone message, offered an award of $5,000 "for every non-white killed during an attack on a white person." Defending the award, Nazi spokesman Dennis Milem stated it was time "for an all-out war for whites against non-whites, and that includes Jews."

Anti-Defamation League of B'nai B'rith, 24 Facts 7 (Mar. 1978).

Neo-Nazi hate literature in the United States is rife with racist references to Jews. For example, *Aryan Nations*, the official publication of a neo-Nazi group of the same name, has exhorted its readers: "Aryans Awake! Jews are the Race of Satan!" *Aryan Nations*, No. 30, at 8 (R. Butler ed. 1983). The magazine explains the program of the Aryan Nations movement in the following manner:

> There is no hope for the White race, if it does not immediately come to the grim realization that the Jewish powers who presently rule over the Western nations desire and work toward the absolute destruction of White men everywhere. The Jews and their surrogates . . . try to force mongrelization of the White race, especially in Britain and America: from racial

whose symbols they appropriated, acted out of racial animus against Jews. The record does not contradict or even challenge that conclusion. As long as people commit acts of violence out of racism, the federal Civil Rights Acts which protect against racial discrimination are an essential remedy to protect victims and make them whole. Contrary to Judge Murnaghan's assumptions in his concurrence (App. 10a), such remedies are not readily available under state law. State criminal statutes generally—and criminal statutes in Maryland specifically—provide no compensation for the victims and depend to a large degree upon prosecutorial discretion. State tort and common law remedies largely ignore the racist character of the acts and do not provide for injunctive relief. Unlike a criminal prosecution for trespass or a generalized tort action for damages under state common law, a federal civil rights action tells the perpetrators that it is the racist character of the acts—and the resulting injury to individual dignity—that society deplores, not just damage to property. It is a reproach to our legal system that it should regard the racially-motivated desecration of Shaare Tefila's synagogue as no more than a garden variety trespass and that the penalty for writing "DEATH TO THE JUDE" and "IN, TAKE A SHOWER JEW" on the walls of a synagogue is no different from the penalty for writing ordinary graffiti on the side of an office building.[17]

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bastardization there can be no hope of return to genetic purity and vitality.

Aryan Nations, No. 32, at 7 (R. Butler ed. 1983).

[17] The inadequacy of state remedies is further illustrated by the record of criminal prosecutions of the respondents here. Six respondents were indicted for their acts on the night of November 1, 1982. Only two of eight counts in the indictments related directly to the synagogue desecration: one count for destruction of property and one count for conspiracy to commit malicious destruction of property. The prosecution entered a *nolle prosequi* against one of the respondents. Three pleaded guilty to single counts unrelated

Jews throughout this country need the protection of the federal Civil Rights Acts to redress acts of racial discrimination.[18] Anti-Semitic incidents are prevalent in the Fourth Circuit, as in other parts of the country, and are increasing in Montgomery County, Maryland, where Shaare Tefila is located.[19] In passing the Civil Rights

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to the synagogue desecration and received suspended sentences. One respondent pleaded guilty to two counts, including the count for conspiracy to commit malicious destruction of property, and received a sentence of three years with all but 120 days suspended. A single respondent was tried and convicted on the two counts relating to the synagogue desecration. He received three-year concurrent sentences on those counts.

[18] The Anti-Defamation League of B'nai B'rith reported 638 incidents of anti-Semitic vandalism against Jewish institutions and private Jewish homes and businesses in 34 states and the District of Columbia in 1985. Maryland ranks fifth in such incidents. Other indications of the seriousness of the problem include the violent actions of a neo-Nazi group called "The Order" and the activities of other organized anti-Jewish hate groups including neo-Nazi groups, the KKK, and the Posse Comitatus. *See* Anti-Defamation League of B'nai B'rith, *1985 Audit of Anti-Semitic Incidents* 1, 5 (1986); *Neo-Nazis Inspire White Supremacists,* Washington Post, Dec. 6, 1984, at A3, col. 1.

[19] The Montgomery County Maryland Human Relations Commission reports that 195 hate violence incidents (including harassment, vandalism, assault, arson and cross-burning) occurred in the County in 1985, compared with 151 such incidents in 1984. Jews were the target in 68 incidents in 1985 and 67 in 1984. In addition, 45 incidents have occurred in 1986 (through May 15, 1986), of which 23 were directed at Jews. Montgomery County [MD] Human Relations Commission, *Montgomery County Government Hate/Violence Incidents Fact Sheet* (May 15, 1986). *See also Local Anti-Semitic Acts More Violent,* Washington Post, Sept. 21, 1985, at B6, col. 1 ("Anti-Semitic incidents in affluent Montgomery County are getting more violent and account for about 75 percent of all reported racial violence in the county, officials said this week"); *Anti-Semitic Incidents Called More Violent,* Montgomery Journal, Sept. 19, 1985, at A5, col. 1. The incidents have included the desecration of a Jewish Community Center (with a three foot high swastika) and an elementary school (with 25 swastikas and the slogans "Hitler youth group" and "kikes must die"). A synagogue in neighboring

Acts, Congress intended to provide a remedy for victims of precisely this kind of vicious harassment. In order to give that assurance to a group which does suffer racial discrimination, this Court should review and reverse the Fourth Circuit's decision.

II. This Court Should Review the Fourth Circuit's Decision Because It Is in Conflict with a Recent Decision of the Third Circuit.

On March 3, 1986, just four days before the Fourth Circuit's decision in *Shaare Tefila*, the Third Circuit held that "ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against them." *Al-Khazraji* v. *Saint Francis College*, 784 F.2d 505, 514 (3d Cir. 1986). Al-Khazraji had alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, sections 1981, 1983, 1985(3), 1986, and state law for alleged discrimination by Saint Francis College in denying him tenure. Saint Francis College moved for summary judgment and argued that an ethnic Arab is taxonomically a Caucasian and therefore "not a protected person under Section 1981 when he is presumably claiming other Caucasians or whites were improperly favored over him." *Al-Khazraji*, 784 F.2d at 514. The Third Circuit agreed with Al-Khazraji and concluded that "*McDonald* rejected the argument that Section 1981 is limited to the protection of nonwhites against racial discrimination . . . . The protection against racial discrimination thus extends beyond those who are taxonomically members of the Negro race. Appellant is therefore not prevented from invoking Section 1981 merely because he is taxonomically classified as a member of the Caucasian race." *Id.* at 515.

Prince George's County also was recently desecrated. Anti-Defamation League of B'nai B'rith, *1985 Audit of Anti-Semitic Incidents* 4 (1986); *Laurel Synagogue is Defaced*, Washington Post, Sept. 16, 1985, at D5, col. 4.

The Third Circuit then turned to the legislative history of the Civil Rights Act of 1866, and prior decisions of this Court, in an attempt to determine "how . . . to recognize the sort of discrimination proscribed by Section 1981." *Id.* (footnote omitted). The court concluded from the legislative history that "Congress did not intend to limit Section 1981 solely to those who could demonstrate that they had been discriminated against because they belonged to a particular group identified and described by anthropologists. When Congress referred in the statute to 'race,' it plainly did not intend thereby to refer courts to any particular scientific conception of the term." *Id.* at 516. The court reversed and remanded to give Al-Khazraji the opportunity to offer proof that the discrimination he alleged is racial discrimination prohibited by section 1981 because "where a plaintiff comes into federal court and claims that he has been discriminated against because of his race, we will not force him first to prove his pedigree." *Id.* at 517.

The law in the circuits now is that a Jew can never state a claim for racial discrimination under section 1982 while an Arab may prove a claim under section 1981 if he or she demonstrates that the discrimination was racial in character.[20] This is a tension between the circuits that should be resolved not only for the typical reasons that it fosters forum shopping and confusion in the district courts and other circuits, but because it irra-

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[20] Moreover, various circuits have divided on the question of whether Hispanics and other ethnic minorities must show that they are racially distinct in order to state a section 1981 or 1982 claim for race discrimination. *Compare Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979) (reversing dismissal of section 1981 claim brought by Mexican-American who complained that discharge from employment was based on race) *with Shah* v. *Mt. Zion Hospital & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981) (claim of employment discrimination by East Indian was properly dismissed on summary judgment because he did not "present any factual support for the assertion that he is 'Black' ").

tionally elevates one group over another for purposes of access to the federal courts.

CONCLUSION

Judge Wilkinson recognized that the fact that Jews are *not* a separate race has afforded them no protection from some of the greatest horrors in history, which were inflicted in the belief that Jews are a distinct and inferior race:

> It is undeniable that the misguided view of the racial distinctiveness of Jews has led to atrocities of no less consequence than those generated by other fallacious beliefs about race. Though history is unfortunately replete with examples of repression of Jews as a people, one need not trace these problems through the ages to discern the consequences of distorted racial views about Jews, for it is during this century that their most terrible effects have been witnessed. Hitler was driven by the belief that Jews constituted a separate race that threatened his goal of racial purity. *See* G. Gilbert, *Nuremberg Diary* 43 (1947) (testimony of Julius Streicher). "The fact that the Nazi 'race' theories represented the most ludicrous and vicious mythology that had ever been perpetuated upon a people did not . . . prevent those myths from functioning as if they were perfectly true." A. Montagu, *Man's Most Dangerous Myth*, at 49. History teaches, then, that misperceptions about racial identity are no different in the misery and hatred they spread than misperceptions about the relevance of race.

(App. 15a-16a (footnote omitted)).

For all of the foregoing reasons, the Congregation respectfully seeks this Court's review of the decision of the Fourth Circuit.

Respectfully submitted,

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